

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Wild West Spirits, LLC

Serial No. 90540784

Vladimir I. Arezina of Via Legal, LLC,
for Wild West Spirits, LLC.

Olivia Lee, Trademark Examining Attorney, Law Office 128,
Travis Wheatley, Managing Attorney.

Before Pologeorgis, English and Lebow,
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Wild West Spirits, LLC (“Applicant”) seeks registration on the Principal Register of the standard-character mark RAILROAD RYE (RYE disclaimed) for “distilled spirits” in International Class 33.¹

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the standard-character mark RAILROAD RED (RED disclaimed) for “wines” in International Class

¹ Application Serial No. 90540784; filed February 23, 2021 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

33² and the standard-character mark RAILROAD ISLAND for “beer” in International Class 32,³ owned by two different entities. When the refusal was made final, Applicant appealed.

In her brief on appeal, the Examining Attorney withdrew the Section 2(d) refusal based on the mark RAILROAD ISLAND so the only basis for refusal before us is the Section 2(d) refusal based on the mark RAILROAD RED for “wines.” For the reasons discussed, we affirm the refusal to register.

I. Evidentiary Issues

A. Applicant’s Office Action Response

In an Office action response, Applicant embedded screenshots, without URL addresses and dates, from the purported websites of the owners of the cited marks and provided hyperlinks to the websites. The Examining Attorney informed Applicant that the screenshots would be given no consideration because Applicant did not provide the required URL addresses and dates the pages were accessed and printed.⁴ Applicant did not remedy the deficiencies so we give the embedded screenshots no consideration.

Further, providing a hyperlink to Internet materials is insufficient to make such materials of record. *Norris v. PAVE: Promoting Awareness, Victim Empowerment*,

² Registration No. 2920943; issued January 25, 2005; renewed.

³ Registration No. 6044395; issued April 28, 2020.

⁴ May 10, 2022, Final Office Action, TSDR 4.

Citations in this opinion to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents. Citations to the briefs refer to TTABVue, the Board’s online docket system.

2019 USPQ2d 370880, at *2 (TTAB 2019); *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013) (providing hyperlinks to Internet materials is insufficient to make linked materials of record); *In re Olin Corp.*, 124 USPQ2d 1327, 1332 n.15 (TTAB 2017); *In re Future Ads LLC*, 103 USPQ2d 1571, 1572 n.3 (TTAB 2012) (Board “will not utilize a link or reference to a website’s internet address to access the site to consider whatever content may appear therein.”); *In re HSB Solomon Assocs. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (because of transitory nature of Internet postings, websites referenced only by address or hyperlinks may be modified or deleted at a later date without notification). Accordingly, we have not utilized the hyperlinks and give no consideration to arguments based on evidence purportedly found at the hyperlinks.

B. Applicant’s Brief

The Examining Attorney objects to Applicant’s citation in its brief to two third-party applications that Applicant did not make of record during prosecution. The objection is sustained. “The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). Moreover, the Board does not take judicial notice of records residing in the U.S. Patent and Trademark Office.⁵ *See, e.g.,*

⁵ In any event, third-party applications “have no probative value.” *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *26 (TTAB 2022) (“Applicant’s proofs that we totally disregard include a significant number of pending and abandoned trademark applications[.] ... Third-party applications are evidence only of the fact that they have been filed[.]”).

Applicant also attached to its brief evidence pertinent to the RAILROAD ISLAND mark and the Examining Attorney objected to the evidence as untimely. But the evidence and objection thereto are moot because the Section 2(d) refusal based on the RAILROAD ISLAND mark

In re Sela Prods., LLC, 107 USPQ2d 1580, 1583 (TTAB 2013); *1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); (TBMP) § 1208.02.

II. Analysis

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. DuPont de Nemours & Co*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co. Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant or for which there is evidence of record. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc'ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and between

has been withdrawn. Applicant and its counsel are advised that if the refusal had not been withdrawn, the evidence would have been excluded as untimely. Trademark Rule 2.142(d); *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) (“The evidence submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution . . . is untimely and will not be considered.”), *aff'd mem.*, 777 F. App’x 516 (Fed. Cir. 2019); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 1203.02(e) and 1207.01 (2022).

the goods or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *see also In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider the “similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *DuPont*, 177 USPQ at 567; *see also Stone Lion Capital Partners, L.P. v. Lion Capital LLC*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014). The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of an ordinary consumer of wines and distilled spirits who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, “there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant argues that RAILROAD is not the dominant element of its mark or Registrant’s mark because of “a number of applications and registrations [incorporating the term RAILROAD] for alcoholic beverages that were deemed capable of peaceful co-existence due to even minor differences in the marks.”⁶ The record, however, includes only one third-party registration for the mark RAILROAD ISLAND for “beer.”

This registration is not evidence that the mark RAILROAD ISLAND is in use for purposes of demonstrating commercial weakness. *In re i.am.symbolic*, 123 USPQ2d at 1751 (federal registrations are not evidence of use of the marks in the marketplace); *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“[T]hird-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have

⁶ Appeal Brief, 4 TTABVUE 8.

become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”). Nor is a single third-party registration sufficient to demonstrate that the RAILROAD portion of the cited mark is conceptually weak. *In re Denisi*, 225 USPQ 624, 625 (TTAB 1985) (the “existence of two registrations (one of which is appellant’s mark) is clearly insufficient evidence on which to support an inference that ‘Perry’s’ is non-distinctive” for restaurant services); *Tony Lama Co., Inc. v. Di Stefano*, 206 USPQ 176, 185 (TTAB 1980) (two third-party registrations for TONY marks in connection with boots insufficient to prove that the mark is weak for boots, shoes or similar products).

Further, Applicant’s mark RAILROAD RYE is much closer to the cited mark RAILROAD RED than the third-party mark RAILROAD ISLAND. The word ISLAND in the mark RAILROAD ISLAND has source-identifying significance whereas the word RYE in Applicant’s mark is generic and has been disclaimed as it identifies a type of distilled spirit, namely, rye whiskey.⁷ Similarly, the word RED in the cited mark RAILROAD RED is generic for “red wine,” a subcategory of the Registrant’s “wines” and has been disclaimed. It is well-settled that disclaimed generic or descriptive matter may have less significance in likelihood of confusion determinations because consumers tend to focus on more distinctive portions of marks. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir.

⁷ September 25, 2021 Office Action, TSDR 11 (AMERICAN HERITAGE DICTIONARY defining “rye” as “whiskey made from the grains of this plant.”); *see also id.* 12-31, 34-47 and May 10, 2022 Final Office Action, TSDR 21, 33 (third-parties selling rye whiskey; one of the third parties also sells rye vodka); *see also* Appeal Brief, 4 TTABVUE 11 (“Applicant’s mark is for RAILROAD RYE, indicative of rye as a type of whiskey.”).

2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark”); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2011) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

We find that RAILROAD is the dominant element of Applicant’s mark and the cited mark because it is the only distinctive matter in the marks and it is the first word in the marks “most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988); *see also Palm Bay Imps.*, 73 USPQ2d at 1692. Consumers encountering Applicant’s and the Registrant’s marks are likely to focus and rely on the RAILROAD portion of the marks for source identification. *Detroit Athletic*, 128 USPQ2d at 1050 (citing *Dixie Rests.*, 41 USPQ2d at 1533-34).

Because the marks share the identical, dominant term RAILROAD and are followed by a generic or descriptive three-letter word that starts with the letter “R,”

the marks are overall similar in appearance. Both marks also sound similar as they share an alliteration.

Applicant argues “the fact that RED, in [the] context [of the cited mark,] refers to wine and that RYE, in [the] context [of Applicant’s mark], refers to distilled spirits or whiskey,” results in marks with “significantly different commercial in impressions to the relevant consuming public in the context of alcoholic beverages.”⁸ We find, however, that the marks are likely to convey similar connotations and commercial impressions because both marks start with the distinctive word RAILROAD and are followed by a term that is generic or descriptive of the identified goods, i.e., rye whiskey and red wine. Indeed, consumers may mistakenly believe that Applicant’s mark RAILROAD RYE for “distilled spirits” identifies an extension of the Registrant’s product line RAILROAD RED for “wines,” or vice-versa.

Overall, we find that the marks are quite similar. The first *DuPont* factor therefore weighs in favor of finding a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Trade Channels

The second and third *DuPont* factors respectively consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” and “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Detroit Athletic*, 128 USPQ2d at 1051-52 (quoting *DuPont*, 177 USPQ at 567); *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (TTAB 2021). We must base our comparisons under the second and third *DuPont* factors on

⁸ Appeal Brief, 4 TTABVUE 11 (emphasis omitted).

the identifications in Applicant's application and the cited registration. *Stone Lion*, 110 USPQ2d at 1162; *Dixie Rests.*, 41 USPQ2d at 1534; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The goods need not be identical for there to be a likelihood of confusion. The evidence need only establish that the goods are related in some manner, or the conditions surrounding their marketing are such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *Coach Servs.*, 101 USPQ2d at 1721; *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re Rexel, Inc.*, 223 USPQ 830, 831 (TTAB 1984).

The Examining Attorney introduced Internet printouts to show that some third-parties use the same mark to identify distilled spirits and wine:⁹

- Wollersheim is both a winery and distillery, offering rye whiskey and wines under the mark WOLLERSHEIM.
- Skinnygirl offering both vodka and wine under the SKINNYGIRL mark.
- Old House is both a winery and distillery, offering whiskey and wine under the OLD HOUSE mark.
- Charbay offers whiskey, vodka, and wine under the mark CHARBAY.
- Flag Hill is both a winery and distillery, offering whiskey, including rye whiskey, rum, brandy, gin, vodka and wines under the mark FLAG HILL.

⁹ September 25, 2021 Office Action, TSDR 31-33, 48-55, 64-74; March 10, 2022 Final Office Action, TSDR 21-34.

- Six Mile Creek is both a winery and distillery, offering, vodka, gin, grappa, and wine in connection with the marks SIX MILE CREEK and SMC.
- Ransom is both a winery and distillery, offering wine, bourbon, gin and whiskey, including rye whiskey, under the RANSOM mark.

Applicant criticizes the foregoing as “extrinsic evidence”¹⁰ but evidence of third-party use of a single mark to identify both an applicant’s and registrant’s goods is commonly used to establish relatedness. *See, e.g., Detroit Athletic*, 128 USPQ2d 1050 (crediting relatedness evidence showing that third parties use the same mark for the goods and services); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (finding two third-party webpages showing applicant’s and registrant’s goods “can be manufactured and sold by a single source” supported relatedness); *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1640 (TTAB 2007) (evidence of three companies selling both clothing and fragrances under the same house mark supported a finding that such goods are related).

Applicant further asserts that the Examining Attorney has introduced “a handful of cherry-picked” and “obscure” examples of relatedness.¹¹ We find, however, that the evidence of third-party use is sufficient “to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift[s] the burden to Applicant to rebut the evidence with competent evidence of its own.” *In re Country Oven, Inc.*,

¹⁰ Appeal Brief, 4 TTABVUE 14; Reply Brief, 7 TTABVUE 4. Applicant also argues that the Examining Attorney “ignores the limitations listed in both the Cited Registration and application” but there are no limitations in either identification of goods.

¹¹ Reply Brief, 7 TTABVUE 4-5.

2019 USPQ2d 443903, at *10 (TTAB 2019). Applicant did not properly introduce any evidence into the record and, therefore, the Examining Attorney's evidence of relatedness stands unrebutted.

Applicant attacks the evidence as failing to demonstrate that “rye whiskey” and “red wine” are “regularly or predominantly sold” under the same marks.¹² “Indeed it is common knowledge that the vast majority of wine brands do not also sell rye whiskey or distilled spirits -- and vice versa, well known rye whiskey brands do not also sell red wines.”¹³ Applicant, however, does not seek registration of its mark for “rye whiskey” but rather has applied to register its mark for a broader category of goods, namely, “distilled spirits.” Similarly, the cited registration is for “wines” not “red wines.” Further, Applicant has not introduced any evidence to support that distilled spirits and wines are not commonly marketed under a single mark. Attorney argument is no substitute for evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

Next, Applicant points out that there is no per se rule that alcoholic beverages are related and that this case is similar to *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282, 1284 (TTAB 2009). In that case, the applicant's standard-character mark VOLTA for “energy vodka infused with caffeine” was refused registration based on a likelihood of confusion with the mark TERZA VOLTA & Design for “sparkling fruit

¹² Reply Brief, 7 TTABVUE 4 (emphasis omitted).

¹³ *Id.* (emphasis omitted).

wine; sparkling grape wine; sparkling wine; wines.” The examining attorney introduced evidence that vodka and wine were offered on the same website to the same consumers and that several vodkas were made with wine grapes. *Id.* at 1285. The Board found that the examining attorney failed to demonstrate relatedness, noting “[t]here is no evidence that vodka, much less applicant’s specific type of [energy] vodka [infused with caffeine], and wine emanate from a single source under a single mark” as opposed to simply being sold on the same website. Unlike in *White Rock Distilleries*, here the Examining Attorney introduced evidence to support that “distilled spirits” identified in the involved application, and “wines,” identified in the cited registration, commonly emanate from a single source under a single mark. Accordingly, while we recognize that there is no per se rule that all alcoholic beverages are related, here the Examining Attorney introduced sufficient evidence to support a finding of relatedness and Applicant has not introduced any evidence to rebut that showing.

Last, Applicant argues that the identified goods themselves are different.¹⁴ The issue, however, “is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the **source** of these goods.” *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *5 (TTAB 2020) (emphasis added); *L’Oreal v. Marcon*, 102 USPQ2d at 1439.

Turning to the third *DuPont* factor, because neither the application nor the cited registration includes limitations as to trade channels or classes of purchasers, we

¹⁴ Appeal Brief, 4 TTABVue 16-17.

must presume that the goods move in all the normal channels of trade for such goods – liquor stores, bars, restaurants and online retailers – and flow to the same classes of purchasers. *See Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“[S]ince there are no restrictions with respect to channels of trade in either applicant’s application or opposer’s registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages” including “bars, restaurants, and liquor stores”); *see also Majestic Distilling*, 65 USPQ2d at 1204 (malt liquor and tequila “similar by virtue of the fact that both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers”); *Monarch Wine Co. v. Hood River Dist., Inc.*, 196 USPQ 855, 857 (TTAB 1977) (whisky, vodka, rum, brandy, wine and champagne travel in same channels of trade to the same classes of purchasers); *In re AGE Bodegas Unidas, S.A.*, 192 USPQ 326, 326 (TTAB 1976) (“[T]here is clearly a relationship between wine and whiskey, both of which alcoholic beverages are sold through the same specialized retail outlets to the same purchasers, and are frequently bought at the same time[.]”).

Moreover, the same third-party Internet evidence referenced above demonstrates that wine and distilled spirits may be encountered by the same classes of consumers under the same marks in at least one common trade channel – the websites and physical locations of wineries and distilleries, i.e., producers and sellers of wine and distilled spirits.

We find that the relatedness of the goods, trade channels, and classes of purchasers weigh in favor of finding a likelihood of confusion.

III. Conclusion

The marks are similar in overall appearance, sound, connotation and commercial impression and the record demonstrates that the goods are related and may be encountered by the same classes of consumers in common trade channels. Accordingly, we find that confusion is likely between Applicant's mark RAILROAD RYE for "distilled spirits" and the cited mark RAILROAD RED for "wines."

Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.